RECENT LEGAL LITERATURE

THORPE'S CONSTITUTIONAL HISTORY OF THE UNITED STATES.—The Constitutional History of the United States, by Francis Newton Thorpe, in Three volumes 1765–1895. Chicago: Callaghan & Co., 1901.

Some months ago, Dr. Francis Newton Thorpe added to our historical literature his work on the Constitutional History of the United States. The book was well received by the reviewers and was at once eagerly examined by those who are interested in the history and development of our constitutional system. It was obvious, however, that three large volumes stored with facts and replete with references to original sources could not be assimilated at once, even by readers with special training and preparation. The book was evidently the work of a ripe scholar. It differed from much that had previously appeared, in that the life of the constitution was its theme, as distinguished from the lives of the framers and expounders of that instrument. Again it differed from some of the earlier works on the same subject, in that the author seemed determined to present to the reader *facts* rather than his own inferences from the facts. As was pointed out by one discriminating reviewer, the work was seen not to be "predominantly legal exposition, metaphysical analysis, sketchy biography or historical essay writing." It is, on the contrary, a compact and orderly presentation of the facts respecting the origin, the formation, the adoption and the exposition of that document which we call our Constitution. In it the reader finds a statement of those relevant facts which lie embedded deep down in the earlier strata of English history. Here, too, he finds an exposition of the questions involved in the income tax cases decided by the supreme court of the United States as recently as 1895. Between these two extremes are massed, in orderly array, the myriad facts of intermediate history. These facts are recorded just as they occurred and the record discloses neither bias nor temper.

Such a book may of course be consulted as a work of reference. It has, however, a peculiar value for him who reads it as a whole. Sufficient time has now elapsed since publication to make it possible not only to read the book carefully but to indulge in some reflections suggested by the author's discriminating historical treatment. It is only through such a use of the book that one can fully grasp the all-important conception that our constitution is the result of a slow development—the product of ages of experience and not the creature of sudden inspiration. Because of a failure to appreciate this truth, many intelligent readers, both laymen and lawyers, are apt to underestimate the importance of constitutional history. A reading of such a book as Dr. Thorpe's is the best corrective for such a mistake. The mere contemplation of the historical facts in their sequence is certain to result in the conviction that from them may be drawn practical inferences of the very highest value.

Among the interesting thoughts which keep recurring to the mind of the reader of the work are those concerning the points of similarity and difference

between our constitutional system and that of England. Englishmen feel as sure as do citizens of the United States that executive, legislative and judicial power will never be exercised except with due regard for the fundamental interests of the individual. The basis of their assurance is experience. The interests of the individual have so long and so uniformly received legal protection that these legally protected interests have ripened into "constitutional rights." He calls them *vested* rights; but the name adds nothing to his security. A "vested" right is merely a right which has usually received recognition. The story of the development by which the interests of the Englishman have gradually gained this recognition is a long story. No argument is needed to show that familiarity with it is essential to a clear understanding of what is the true significance of the rights themselves and to an estimate of how justifiable is the Englishman's assurance that his enjoyment of them will not be disturbed. In other words, the importance to the Englishman of a study of constitutional history is evident and beyond all dispute. In this country, however, there is a prevalent belief that the basis of our constitutional security is different from the Englishman's. We are accustomed to point a contrast between the English constitution and our own and in many respects the contrast is striking indeed. We all know, in a general way, that in England the executive power is vested in the Crown, the judicial power in the Courts of the realm, including the House of Lords, and the legislative power in Parliament. To some of us the conception is familiar that the power of Parliament is supreme. Some of us, not many, realize that while the sovereign is by no means a figurehead, far less constitutional power is vested in the crown than in the President of the United States. The real power among our English brethren is the majority in the House of Commons, whose leader for the time being is premier. With us the President wields the whole military and a large share of the civic power of the nation. His veto may control legislation and at times it rests with him to determine whether we shall have war or peace. In dispensing the enormous patronage which in accordance with our political system he controls, he exercises (as has been well said), "functions which are more truly regal than those of an English monarch. Elect such a magistrate for life, or give him a permanent hold on office, and he may be termed Mr. President but will be every inch a king."—(Hare). Again, still fewer realize that Parliament has power to pass all laws, with no other limit than that set by the reason and judgment of the Lords and Commons. Parliament may supersede the courts of justice by a commission acting under martial law and may "arrogate to itself the trial of any cause that it does not desire to leave to the ordinary tribunals." The Courts have no jurisdiction to declare acts of Parliament unconstitutional. Why, then, may it not be said that Parliament is despotic? In what sense is England under the sway of a constitutional government? The reply of the historian is that for ages the Parliament has proceeded according to the rules and precedents which are deeply rooted in the minds and hearts of all Englishmen, and there is no subject of the King who is in danger of being deprived of life or liberty or property except in accordance with that due course of law prescribed by Magna Charta. In a real sense, therefore, it may be said that Parliament cannot run athwart the traditional liberties of Englishmen. We, the people of the

United States, on the other hand, have embodied in a written constitution the declaration of principles in accordance with which it has been our will to live. In England, when a measure is proposed in Parliament, no question of legislative *power* need be considered. The only inquiry is: "Is the measure consistent with principle and such as the circumstances demand?" With us the question must be: "Is the measure expedient and, if it is, is it consistent with the provisions of our Constitution?" No matter how great the expediency of an act may be, it is of none effect if it transgresses the limitations set by our fundamental law. As is well known, it is the peculiar function of the American judiciary to determine whether or not an act of Congress or of a state legislature is constitutional. The exercise of this vast power may be regarded as essential to the conception of a written constitution. The supremacy of the judiciary over the legislature has been our boast. It is a feature of our constitutional system which has excited the admiration of foreigners. Our Constitution, as interpreted and developed by the supreme court of the United States has proved to be the bulwark of our liberty. By a use of the judicial power that may well be regarded as inspired, Marshall (after Washington the greatest of Americans) found it possible to make of us a nation. By a wise exercise of the same power, Miller and Bradley, worthy successors of the great Chief Justice have removed the barriers interposed by states to check the even flow of national commerce. Perhaps no better description of this feature of our American system can be found than that contained in the opinion of Mr. Justice Harlan in a recent case: "The duty rests upon all courts, Federal and State, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and the duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land."

The people of the United States, then, have framed an elaborate statute for their own government. Legislative and executive action not in harmony with the provisions of this statute is inoperative. For us, the interests which the provisions of the statute protect are "vested constitutional rights." It is thus seen that while the basis of the Englishman's security is the fact that his people have been accustomed to act only in accordance with certain principles, the basis of our security (if there is really a difference) is found in the fact that our ancestors have made a formal declaration that future action shall conform to what are fundamentally the same principles. But we cannot forget that behind and beyond the declaration is the story of the principles which the declaration embodies. On the hither side of the declaration is the story of the treatment which the constitution has received in the house of its friends. Clearly, then, the importance to us of a study of constitutional history is as great as to the Englishman. It is essential that we should know the pedigree of each provision that our constitution contains. We must be familiar with the steps which led to the assembling of these provisions in a single instrument. The operation of the adopted constitution must be studied. The elements of its strength and weakness must be scrutinized. Accepted

and rejected amendments cannot be overlooked. An estimate must be formed of the strains which it has withstood, if we are to have an intelligent opinion respecting its durability. We must, in fine, study constitutional history in order to know what a constitution is and what our attitude toward it should be. Shall we think of the constitution itself as the basis of our security or shall we rely rather upon the continuing satisfaction of the mass of the people with the principles which it embodies? This is an interesting practical question. If we adopt the former alternative, we shall be apt to think that the remedy for every ill is to insert in the constitution a provision upon the subject. In interpreting the constitution we shall be apt to ignore the relation between the question at issue and the national will. If we adopt the latter alternative, we shall be slow to insert in the constitution anything but declarations of principles which have already become fixed and fundamental. We shall hesitate so to interpret the constitution as to leave the United States stripped of any one of the powers usually exercised by sovereigns, whether the power relates to territorial acquisition or to other matters.

That this question respecting our conception of the Constitution is a practical question sufficiently appears when we examine the constitutions of the several states. In the state constitutions we find prohibitions upon local and special legislation, upon the consolidation of parallel and competing railway lines and various other provisions dictated by a distrust of the legislature or a desire to impose upon the community for all time an economic theory of doubtful soundness. There are those who think that the cause of Christianity can be promoted by inserting the name of God in the Constitution of the United States. There is observable in many quarters, an impression that the only qualification for the admission of a provision into the Constitution of the United States is the willingness of the people to insert it. Once inserted, it seems to be assumed that the whole question is set at rest and that no future national development will threaten the efficacy of the restriction.

Dr. Thorpe has given us in attractive form the material from which to construct a truer theory of the relation of our national Constitution to national growth. His story of the recognition of the new nation is followed by an accurate and detailed narrative of the evolution of the national Constitution. Then comes the account of the submission of the Constitution to the people for ratification in the several states, followed by an exhaustive consideration of the first twelve amendments. Perhaps the most interesting part of the whole work is that which is found in Book 4—"Contest and Compromise." Under this title we find a discussion of the contention for sovereignity between the states and the United States and the admirable chapter on "The Law of the Constitution," in which Dr. Thorpe shows himself to be a constitutional lawyer as well as a historian. In this chapter, Dr. Thorpe has been wise in making use of the work of Judge Cooley and thus places himself indirectly under obligation to the University of Michigan. In this book also appears the history of the Kansas-Nebraska struggle, of the Dred Scott decision and of the progress of secession. Here, also, is found an interesting chapter on "The Rejected Amendment of 1861." "The amendment," says Dr. Thorpe, "is one of the paradoxes of history. Few Americans are aware that while states were seceding and their representatives in Congress were proclaiming that no compromise on slavery could longer keep them in 'the

old Confederacy,' a Republican House, a Democratic Senate and President Buchanan, proposed an amendment to the Constitution making slavery perpetual in the United States. And perhaps fewer are aware that President Lincoln, in his inaugural, declared that he had 'no objection to its being made express and irrevocable.' But man and nature were against the principle of the proposed amendment. We shall see how it was ignored by the Nation." The third volume (which begins with Book 5) traces the story of emancipation. Then comes the history of the 13th Amendment, while Book, 6 deals with the extension of the suffrage, including the history of the 14th and 15th Amendments and of the re-construction policy. "With the adoption of the 15th Amendment, the Constitution as a piece of political work extending into two centuries during its formative period, was completed."

Dr. Thorpe's work ends with two chapters, "The Sources and Authorship of the Constitution" and "Later Exposition of the Law of the Constitution." The last chapter might have been amplified with advantage, in order to preserve a balance with the detailed treatment given to similar matters earlier in the work. As it stands, the chapter is hardly more than a sketch and an incomplete one. Perhaps, however, this latter exposition of the law of the Constitution has not yet become "history." Perhaps it is too soon to expect the historian to accord it more than passing mention. It is to be observed, however, that it is only in virtue of this chapter that Dr. Thorpe's work can be regarded as covering a period more recent than, say, 1870.

Such is the outline of the author's treatment of his subject. When regard is had to the slow development of each of the provisions of the Constitution and its amendments and when consideration is given to the many evidences of the futility of constitutional declarations which do not reflect national will, it is difficult to escape the conclusion that the true basis of our security, like that of the Englishman, is to be found in the historical fact that we, as a people, have formed and are forming "constitutional habits" which are re-inforced but not created by the declarations of our Constitution. If we read this constitutional history with care, we shall be slow to give our adherence to any interpretation of our Constitution which tends to bring it athwart the stream of national progress.

PHILADELPHIA, May, 1902 GEORGE WHARTON PEPPER

THE AMERICAN STATE REPORTS, containing the Cases of General Value and Authority Subsequent to those Contained in the "American Decisions" and the "American Reports," Decided in the Courts of Last Resort of the Several States. Selected, Reported, and Annotated by A. C. Freeman, and the Associate Editors of the "American Decisions." Vol LXXXII. San Francisco: Bancroft-Whitney Company. Law Publishers and Law Booksellers. 1902. Sheep, 8vo, pp. 1059.

Considered as an entirety, the "American" series of reports (comprising the AMERICAN DECISIONS, 100 volumes of cases selected from the American reports from the earliest period down to 1869; the AMERICAN REPORTS, including selected cases from the various state reports from 1869 to 1888, and the AMERICAN STATE REPORTS, now numbering 82 volumes, from 1888 to the